Supreme Court, U.S.
FILED
APR 10 1998
CLERK

No. 97-6270

In The

Supreme Court of the United States

October Term, 1997

GERALD R. CARON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

REPLY BRIEF FOR PETITIONER

OWEN S. WALKER
Counsel of Record
Federal Defender Office
125 Pearl Street, 3rd Floor
Boston, MA 02110
(617) 424-0575

BJORN R. LANGE
Federal Defender Office
22 Bridge Street
Concord, NH 03301
(603) 226-7360

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

13 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

RELEVANT STATUTES 1

ARGUMENT 2

BOTH THE GOVERNMENT'S KEY ARGUMENT – THAT THE "ALL OR NOTHING" VIEW IS REQUIRED CONSTRUCTION "PARALLEL" TO THE WAY THE PHRASE "SHIP, TRANSPORT, POSSESS, OR RECEIVE" IN THE PARDON/CIVIL-RIGHTS'-RESTORATION EXEMPTION MUST BE CONSTRUED – AND ITS SUPPORTING ARGUMENT BASED ON THE WORD "ANY" IN THE STATUTORY DEFINITION OF "FIREMAN" LACK MERIT 2

1. The Government's "Parallel Construction" Argument 3

2. The Government's Appeal to the Word "Any" in the Statutory Definition of "Firearm" 7

3. Additional Notes 8

CONCLUSION 10

TABLE OF AUTHORITIES

Page

CASES

Lewis v. United States, No. 96-7151, 66 U.S.L.W. 4194 (March 9, 1998) 9

Perrin v. United States, 444 U.S. 41 (1979)..... 4

United States v. Estrella, 104 F.3d 3 (January 9, 1997) *cert. denied*, 117 S.Ct. 2494 (1997)..... 4

United States v. Qualls, 108 F.3d 1019 (9th Cir. 1997) ....

United States v. Qualls, 1998 WL 149393 (9th Cir. April 2, 1998) (en banc) 3

STATUTES

18 U.S.C. § 13(a) 9

18 U.S.C. § 921(a)(3)..... 1, 3, 7

18 U.S.C. § 921(a)(20)..... 1

18 U.S.C. § 922(g) 1

Mass. Gen. L. ch. 140, § 129B..... 5

Mass. Gen. L. ch. 269, § 10(a)..... 5

MISCELLANEOUS

Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed*, 3 Vanderbilt L.R. 395 (1950) 6

RELEVANT STATUTES

1. Section 921(a)(20) of Title 18 of the United States Code says in part:

> Any conviction which has been expunged, or set aside or for which a person has been pardoned or has had civil rights restored shall not be considered a conviction for purposes of this chapter, unless such pardon, expungement, or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive firearms.

2. Section 921(a)(3) of Title 18 of the United States Code says:

> (3) The term "firearm" means (A) any weapon (including a starter gun) which will or is designed to or may readily be converted to expel a projectile by the action of an explosive; (B) the frame or receiver of any such weapon; (C) any firearm muffler or firearm silencer; or (D) any destructive device. Such term does not include an antique firearm.

3. Section 922(g) of Title 18 of the United States Code says in pertinent part:

> It shall be unlawful for any person –
>
> (1) who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year,
>
> . . .
>
> to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm

or ammunition which has been shipped or transported in interstate or foreign commerce.

ARGUMENT

BOTH THE GOVERNMENT'S KEY ARGUMENT – THAT THE "ALL OR NOTHING" VIEW IS REQUIRED BY CONSTRUCTION "PARALLEL" TO THE WAY THE PHRASE "SHIP, TRANSPORT, POSSESS, OR RECEIVE" IN THE PARDON/CIVIL-RIGHTS'-RESTORATION EXEMPTION MUST BE CONSTRUED – AND ITS SUPPORTING ARGUMENT BASED ON THE WORD "ANY" IN THE STATUTORY DEFINITION OF "FIREARM" LACK MERIT

The government takes the position that the pardon/rights' restoration exemption from the federal firearms law – that a prior conviction does not count if the pardon or restoration of civil rights "expressly provides that the person may not ship, transport, possess, or receive firearms" must be read as "all or nothing." In other words, if there are firearms that the pardon or restoration of rights denies the person, he has no exemption from federal law, even for guns the pardon or restoration of rights allows him.

The government clearly accepts petitioner's ("defendant's") central point in the first agreement in his brief: that a pardon or restoration of rights that allows a person some (but not all) guns is *not* one that provides that the person may not possess firearms – and that any other reading does violence to ordinary usage. Instead, the government's primary argument is that the statute's use of four alternative verbs and its use of the word "any" in

the statutory definition of "firearms" (18 U.S.C. § 921(a)(3)) change the entire meaning of the sentence at issue.

This reply brief addresses this primary government argument. (We do not think further briefing on the other issues would assist the Court.[1])

1. The Government's "Parallel Construction" Argument

The government's key argument appears in just three sentences in the paragraph beginning on p. 15 of its brief ("Br."). The government notes that the "unless" clause includes not just a single verb (such as "possess") but four verbs stated in the alternative, *i.e.*, "ship," "transport," "possess," and "receive." This "enumeration" of four alternative restrictions, it says, "immediately suggests" that the "unless" clause is true – and any pardon or civil rights' restoration of no help to a felon-in-possession or ACCA defendant – "if the State continues to limit a felon's firearms privileges in any of the listed ways." Br. 15-16. It then asserts that by "parallel construction" the "unless" clause is true "if the State imposes such limitations with respect to any 'firearms.' " Br. 16. (This argument is repeated at Br. 17, n.7.)

The argument does not hold up under scrutiny.

---

[1] We note the Ninth Circuit's April 2, 1998 en banc opinion in *United States v. Qualls*, 1998 WL 149393, sent the Clerk by the Solicitor General by letter of April 3. (The panel opinion is reported at 108 F.3d 1019.) The majority opinion, which rejects the "all or nothing" view, is based upon the goal of deference to state interests, as is defendant's second main argument in his opening brief (at pp. 18-23).

BEST AVAILABLE COPY

First, the idea that the "all or nothing" view is correct because the "expressly provides" clause has four verbs rather than just one is remarkable. As already noted, the government obviously concedes that no speaker of English would say that a pardon that allowed the person pardoned to possess hunting guns but not handguns "provides that the person may not possess firearms." But, it says, if one adds to the clause the words "ship," "transport," and "receive" alongside the word "possess," the entire meaning of the clause changes and its reading is shown to be correct. This contention might come as a surprise to an ordinary person, perhaps unfamiliar with the way lawyers are trained to read. (Needless to say, statutes usually *are* to be read the way ordinary people would read them. "[U]nless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. United States*, 444 U.S. 41, 42 (1979).)

Adding the three verbs changes nothing. If a pardon provides the pardoned person "may ship, transport, possess, and receive hunting guns and may not ship, transport, possess, or receive handguns," no one would then say that the pardon expressly provides that the person may not ship, transport, possess, or receive firearms. One *would* say that there are firearms that the pardon expressly provides that the person may not ship, transport, possess, or receive. But this is quite different, just as "I dislike people" differs altogether from "There are people that I dislike."

Second, the government is simply wrong in saying that the "enumeration" of various restrictions, listed in the alternative, immediately "suggests" that if *any* one of

the four activities of shipping, transporting, possessing, or receiving firearms is prohibited by a pardon or restoration of rights, the "unless" clause applies and the person gets no exemption from the firearms law. It suggests nothing of the kind. If an anti-tobacco philanthropist leaves money for maintenance of a college's buildings on condition that the college provide that people may not smoke or chew tobacco in the buildings, it would violate the bequest's terms for the college to bar tobacco chewing but allow smoking. A provision that people may not smoke *or* chew tobacco bars people from smoking tobacco and bars them from chewing tobacco.

Likewise, a provision that someone may not ship, transport, possess, or receive firearms requires that the person neither ship, transport, possess, nor receive firearms. Of course, the four verbs overlap: a ban on possessing firearms seemingly bans shipping, transporting, and receiving them. Suppose, however, a pardon allows a person to possess guns at home but prohibits him from transporting or carrying them outside the home. (The example is not fanciful. As *United States v. Estrella*, 104 F.3d 3, 7, *cert. denied*, 117 S.Ct. 2494 (1997) (J.A. at 65), notes, Massachusetts, while forever prohibiting felons from carrying handguns, five years after a felon's release from imprisonment terminates its bar on possessing handguns at home or place of business. Mass. Gen. L. ch. 140, § 129B and ch. 269, § 10(a).) Though the pardon bars transporting, it is false, given the pardon's stipulation allowing possession of certain firearms (at home), to say that the pardon "provides that the person may not ship, transport, possess, or receive firearms."

Third, one *construes* words and phrases only when there is a question about what they mean. That both the phrase "ship, transport, possess, or receive" and the word "firearms" as used in the operative sentence can, in the government's view, be *construed* – let alone that they can be construed in "parallel" manner – suggests there is some uncertainty about the meaning of the phrase and the word. If that is the case – if Congress in the six-word phrase "ship, transport, possess, or receive firearms" created *two* problems of construction – then the meaning of the statute is certainly unclear and the rule of lenity must apply. Also, if the word "firearms" becomes clear only by construction "parallel" to the construction of "ship, transport, possess, or receive," there must be another way of "construing" it that is not in parallel with the way "ship, transport, possess, or receive" must be construed. If so, the government nowhere explains why this is a proper case for applying, rather than *not* applying, whatever rule of construction it claims to be using. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons about How Statutes are to be Construed*. 3 Vanderbilt L.R. 395 (1950).

And what *is* the method of construction that the government says applies, in parallel fashion, to both "ship, transport, possess, or receive" and to "firearms" as used in the statute? A series of words expressed in the alternative may sometimes need construction – hence "ejusdem generis," "noscitur a sociis," and like canons. But "firearms" is a single word, not an "enumeration" of alternatives. How, then, can it be construed in *parallel* to such an enumeration?

Suppose, indeed, that the statute did have, instead of the single word "firearms," an enumeration. Suppose it said that convictions for which there is a pardon or rights' – restoration do not count "unless such pardon or restoration or civil rights expressly provides that the person may not ship, transport, possess, or receive long-barreled guns or handguns." Would *that* phrasing make the government's view true? Clearly not. One does not expressly provide that a child many not have ice cream or candy by telling him he may have ice cream but not candy. Nor does one expressly provide that a person may not have long guns or handguns by telling him he may have long guns but not handguns.

2. The Government's Appeal to the Word "Any" in the Statutory Definition of "Firearm"

The government says that the conclusion it arrives at by parallel construction is reinforced by the fact that the definition of "firearm" in 18 U.S.C. § 921(a)(3) uses the word "any" – "any" weapon that expels a projectile by action of explosive, the frame of "any" such weapon, "any" silencer, or "any" destructive device. But what if the "expressly provides" clause had read "unless such . . . pardon or restoration of civil rights expressly provides that the person may not ship, transport, possess, or receive any firearms"? The addition of the word "any" changes the clause's meaning not a particle. Telling a child she may not have candy on weekdays is no different from telling her she may not have any candy on weekdays.

3. Additional Note

The "all or nothing" view is right, the government says, *because* of the arguments about parallel construction of the enumeration of alternatives and about the "any"s in the definition of "firearms." This would be news to the courts, like the circuit court here, that adopted the "all or nothing" view without the linguistic gyrations that the government deems necessary.

The matter, we submit, is simpler than that. The "all or nothing" courts just read the statute incorrectly, opposite to the only way normal people would or could. Saying that a pardon or restoration of rights provides one may not ship, transport, possess, or receive firearms is utterly different from saying that there are firearms that a pardon or restoration of rights provides one may not ship, transport, possess, or receive. There is only one way to read the statute and that reading contradicts the "all or nothing" view held by the government and the circuit court. The government's efforts to tease an alternative meaning out of the statute's words are in vain.

That the only possible reading has – if one is being pedantic – the consequence that a pardoned or rights' – restored felon is exempt from felon-in-possession prosecution even if he possesses a firearm that the pardon or rights'– restoration disallows would give an ordinary person not a moment's pause. The government insists that defendant is stuck with that pedantic view, even though the government knows full well that literal

readings should not always be followed.[2] ("If the words ["any enactment" in the Assimilative Crimes Act, 18 U.S.C. § 13(a)] are taken literally, then Louisiana's law [against first-degree murder] could not possibly apply . . . We agree with the Government, however, that this is not a sensible interpretation of this language, since a literal reading of the words "any enactment" would dramatically separate the statute from its intended purpose." *Lewis v. United States*, No. 96-7151 (March 9, 1998), 66 U.S.L.W. 4194, 4195.)

---

[2] Indeed, the government's "all or nothing" reading of the statute – even were it a possible reading – could itself lead to a counterintuitive result if the statute's words are taken literally. If a pardon were worded so as to allow a person "all firearms except those no one may possess (sawed off shotguns, bazookas, etc.)," the limitation the pardon places on (wholly illegal) firearms' possession would, on the government's theory, prevent the pardon from exempting the person from federal firearms law.

CONCLUSION

Petitioner reiterates his request that (1) the judgment of the court of appeals be reversed – and thus that the district court judgment be reinstated in finding petitioner not eligible for sentencing under the Armed Career Criminal Act – and (2) the order of the court of appeals dismissing petitioner's cross-appeal (of the district court's upward departure) be vacated.

GERALD R. CLARON
By his attorneys,

OWEN S. WALKER
Federal Defender Office
125 Pearl Street, 3rd Floor
Boston, MA 02110
Tel: 617-424-0575

BJORN R. LANGE
Federal Defender Office
22 Bridge Street
Concord, NH 03301
Tel: 603.226-7360